BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD OF THE STATE OF CALIFORNIA

AB-8613
File: 20-403503 Reg: 06062452

KAYO OIL COMPANY, dba Circle K # 76-2705748
6401 Dublin Boulevard, Dublin, CA 94568,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Stewart A. Judson

Appeals Board Hearing: January 10, 2008
San Francisco, CA

ISSUED MARCH 21, 2008

Kayo Oil Company, doing business as Circle K # 76-2705748 (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which suspended its license for 15 days, with 5 days stayed for a probationary period of one year, for appellant's clerk selling an alcoholic beverage to a Department minor decoy, a violation of Business and Professions Code section 25658, subdivision (a).

Appearances on appeal include appellant Kayo Oil Company, appearing through its counsel, Ralph B. Saltsman and Stephen W. Solomon, and the Department of Alcoholic Beverage Control, appearing through its counsel, Dean R. Lueders.

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[1]The decision of the Department, dated September 7, 2006, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale beer and wine license was issued on October 15, 2003. The Department filed an accusation against appellant charging that, on January 14, 2006, appellant's clerk sold an alcoholic beverage to 18-year-old Joseph McGlinchy. Although not noted in the accusation, McGlinchy was working as a minor decoy for the Department at the time.

At the administrative hearing held on July 20, 2006, documentary evidence was received and testimony concerning the sale was presented. Subsequent to the hearing, the Department issued its decision which determined that the violation charged was proved and no defense was established.

Appellant has filed an appeal contending that the Department violated prohibitions against ex parte communication with the decision maker.[2]

DISCUSSION

Appellant contends the Department violated the APA by transmitting a report of hearing, prepared by the Department's advocate at the administrative hearing, to the Department's decision maker after the hearing but before the Department issued its decision. It relies on the California Supreme Court's holding in *Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Board* (2006) 40 Cal.4th 1 [145 P.3d 462, 50 Cal.Rptr.3d 585] (*Quintanar*) and two appellate court decisions following *Quintanar*: *Chevron Stations, Inc. v. Alcoholic Beverage Control Appeals Board* (2007) 149 Cal.App.4th 116 [57 Cal.Rptr.3d 6] (*Chevron*) and *Rondon v.*

[2]Appellant also filed a motion asking the Board to augment the record with any Report of Hearing in the Department's file for this case. Our decision on the ex parte communication issue makes augmenting the record unnecessary, and the motion is denied.

Alcoholic Beverage Control Appeals Board (2007) 151 Cal.App.4th 1274 [60 Cal.Rptr.3d 295] (*Rondon*). Appellant asserts that, at a minimum, this matter must be remanded to the Department for an evidentiary hearing regarding whether an ex parte communication occurred.

The Department makes no argument in its appeal brief, but states that none of the documents requested in the motion to augment exist. Attached to this statement is a declaration signed by Department staff attorney Dean Leuders who represented the Department at the administrative hearing. In this declaration, Leuders states that at no time did he prepare a report of hearing or other document, or speak to any person, regarding this case. In its brief, the Department makes no statements or assertions concerning these denials or what it believes should be the effect of them on this appeal. At oral argument, the Department argued that the Appeals Board should accept the declaration as conclusive evidence that the documents requested did not exist.

We agree with appellant that transmission of a report of hearing to the Department's decision maker is a violation of the APA. This was the clear holding of the Court in *Quintanar*, *supra*.

The Department apparently believes that it need only include a declaration denying the existence of an ex parte communication for the Appeals Board to rule in its favor. Appellant argues that the declaration is inadequate and the matter needs to be remanded so that further evidence may be taken. We agree with appellant.

Three courts have now issued published decisions in which the Department's practice of ex parte communication with its decision maker or the decision maker's advisors is determined to be endemic in that agency. (*Quintanar*, *supra*, 40 Cal.4th 1, 5

[ex parte provision of report of hearing was "standard Department procedure"]; *Rondon*, *supra*, 151 Cal.App.4th 1274, 1287 ["widespread agency practice of allowing access to reports"]; *Chevron*, *supra*, 149 Cal.App.4th 116, 131 [ex parte communication not unique to *Quintanar* case, "but rather a 'standard Department procedure'"].) The Department has presented no evidence in this case, or any of the numerous other cases this Board has seen on this issue, that the "standard Department procedure" has changed. The Department has not provided, for example, a written policy, with a date certain, from which we could conclude that the Department has instituted an effective policy screening prosecutors from the decision makers and their advisors. The Department bears the burden of proving that it has adequate screening procedures (*Rondon*, *supra*), and without evidence of an agency-wide change of policy and practice, we would be exceedingly reluctant to affirm or reverse on the basis of a single declaration, especially where there has been no opportunity for cross-examination.[3]

For the foregoing reasons, we will do in this case as we have done in so many others, that is, remand this matter to the Department for an evidentiary hearing.

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[3] The general rule in civil actions is that absent statutory authorization, stipulation of the parties, or a waiver by failure to object, an affidavit (Code Civ. Proc., § 2003) or a declaration under penalty of perjury (Code Civ. Proc., § 2015.5) is not competent evidence; it is hearsay because it is prepared without the opportunity to cross-examine the affiant.

(Windigo Mills v. Unemployment Ins. Appeals Bd. (1979) 92 Cal.App.3d 586, 597 [155 Cal.Rptr. 63].)

We are not aware of any statutory authorization, stipulation of the parties, or waiver that would make this declaration competent evidence.

ORDER

The matter is remanded to the Department for an evidentiary hearing in accordance with the foregoing opinion.[4]

FRED ARMENDARIZ, CHAIRMAN
SOPHIE C. WONG, MEMBER
TINA FRANK, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

[4]This order of remand is filed in accordance with Business and Professions Code section 23085, and does not constitute a final order within the meaning of Business and Professions Code section 23089.